

Appellate No. SC84718

**In the
SUPREME COURT OF MISSOURI
ENBANC**

**STATE OF MISSOURI,
Respondent,**

vs.

**RICK LYNN EMERY,
Appellant.**

**Appeal from the Circuit Court of
Douglas County, Missouri
Circuit Division
Honorable John Moody, Judge
Case No. CV101-7F**

APPELLANT’S SUBSTITUTE BRIEF

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TABLE OF CASES AND AUTHORITIES CITED

MO Const. Art. I, § 10	Pages 3, 4, 6, 8, 10
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US Const. amend XIV	Pages 3, 4, 6, 8, 10
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RSMo. § 558.016	Pages 8
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JURISDICTIONAL STATEMENT

This case is an appeal from the convictions of Felony Driving While Intoxicated and Second Degree Assault with a motor vehicle, arising from an automobile accident in Wright County, Missouri on January 27, 2001. This case does not involve any matter within the exclusive jurisdiction of the Supreme Court

and is thus within the general jurisdiction of the Court of Appeals as set forth in Article 5, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Rick Lynn Emery, Appellant, was prosecuted and convicted in the Circuit Court of Douglas County, Missouri for Felony D.W.I. and Second Degree Assault with a motor vehicle. These two cases were consolidated for trial on June 12, 2001. (L.F. 30). This cause was tried to a jury on September 20, 2001. (L.F. 3). Appellant was represented by attorney Scott Stinson at trial. Witness Norma Gean testified at trial that Appellant and another man, a Bob Fullington, left the home of Norma Gean on January 27, 2001. (Trial Transcript 35). Witness Norma Gean testified that Bob Fullington was driving and that they were traveling in Bob Fullington's vehicle. (Trial Transcript 35). Witness Bob Fullington testified that Rick Emery began driving the vehicle at some point after leaving Norma Gean's residence and was driving when the car collided with Cheryl Todd. (Trial Transcript 45-46). Witness Bob Fullington also testified that he would be given immunity if he would testify for the prosecution. (Trial Transcript 49-50). The defense denied these allegations and disputed them on cross-examination. (Trial Transcript 114).

At the trial and at sentencing, no evidence was offered of any prior D.W.I. offenses committed by Rick Lynn Emery. The Court submitted the cause to the

jury without instructing that the D.W.I. was not a felony as there was no evidence proving any prior convictions and without instructing that there could be no prior persistent offender charges, as the prosecution had pled for on both the D.W.I. and the Second Degree Assault. The Court failed to allow the jury to pass sentencing under the prior persistent offender statute *RSMo. § 557.036.2*. The jury returned a verdict of guilty to Felony D.W.I even though no evidence of prior offenses was submitted to enhance the D.W.I. to a felony. (L.F. 51). The jury returned a verdict of guilty as to the felony Second Degree Assault. (L.F. 52). The jury was not allowed to determine the sentencing, and the range of punishment was for that of a prior persistent offender. (L.F. 14, 34).

Sentencing was delivered by the Court on November 6, 2001. (L.F. 55). The Court sentenced Appellant to six months for the Felony D.W.I. and seven years for the Felony Second Degree Assault. (L.F. 55, 56). The sentences were to run consecutively. (L.F. 55). No post-trial motions were filed by Appellant or his prior attorney. A notice of appeal was filed on November 16, 2001. Appellant has been incarcerated since the sentencing.

POINTS RELIED ON

1) THE COURT ERRED IN ENTERING A JUDGMENT CONVICTING APPELLANT OF BEING A PRIOR PERSISTENT OFFENDER FOR A FELONY DRIVING WHILE INTOXICATED BECAUSE A D.W.I. FIRST OFFENSE IS A MISDEMEANOR CRIME AND NO EVIDENCE WAS OFFERED AND NO FINDINGS WERE MADE AS TO THE EXISTENCE OF ANY PRIOR OFFENSES.

RSMo. § 577.023.6 and § 577.023.14.

RSMo. § 577.010.

State v. Bailey, 839 S.W.2d 657, 661 (Mo.App. 1992).

State v. Vickers, 956 S.W.2d 405 (Mo.App. S.D.1997).

2) THE COURT ERRED IN DELIVERING ITS SENTENCES WITHOUT PERMITTING THE JURY TO RECOMMEND PUNISHMENT, BECAUSE IT IS THE JURY'S RESPONSIBILITY TO ASSESS PUNISHMENT AND NO EVIDENCE WAS SUBMITTED AND NO FINDINGS WERE MADE AS TO ANY PRIOR AND PERSISTENT OFFENDER STATUS AND THEREFORE, THE COURT SHOULD HAVE ALLOWED THE JURY TO ASSESS PUNISHMENT AS PART OF THEIR VERDICT. THE FAILURE TO ALLOW THE JURY TO ASSESS PUNISHMENT, VIOLATED APPELLANT'S RIGHT TO DUE PROCESS.

State v. Cooper, 16 S.W.3d 680 (Mo.App. E.D. 2000).

RSMo. § 557.036.

U.S. Const. amend XIV.

MO Const. Art. I, § 10.

3) THE COURT ERRED IN SENTENCING APPELLANT AND ALLOWING THE JURY'S VERDICT ON THE SECOND DEGREE ASSAULT TO STAND BECAUSE THE JURY WAS MISLED AS TO PRIOR CONVICTIONS WHICH WERE NOT PROVEN AND MISLED BY THE FELONY DRIVING WHILE INTOXICATED CHARGE WHEN A FELONY WAS NOT POSSIBLE BECAUSE OF THE FAILURE TO PROVE ANY PRIOR CONVICTIONS AND THE MISLEADING OF THE JURY PREJUDICED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

U.S. Const. amend XIV.

MO Const. Art. I, § 10.

4) THE COURT ERRED IN INSTRUCTING, CONVICTING AND SENTENCING THE APPELLANT TO BOTH A DRIVING WHILE

**INTOXICATED OFFENSE AND A SECOND DEGREE ASSAULT
BECAUSE DOUBLE JEOPARDY PROHIBITS THE CONVICTIONS OF
BOTH CRIMES ARISING FROM THE SAME SET OF
CIRCUMSTANCES.**

Rost v. State, 921 S.W.2D 629 (Mo.App. S.D 1995).

Bally v. Kemna, 65 F.3d 104 (8th Cir. 1995).

U.S. Const. amend. V and XIV.

ARGUMENT

I.

**THE COURT ERRED IN ENTERING A JUDGMENT CONVICTING
APPELLANT OF BEING A PRIOR PERSISTENT OFFENDER FOR A
FELONY DRIVING WHILE INTOXICATED BECAUSE A D.W.I. FIRST
OFFENSE IS A MISDEMEANOR CRIME AND NO EVIDENCE WAS
OFFERED AND NO FINDINGS WERE MADE AS TO THE EXISTENCE
OF ANY PRIOR OFFENSES.**

Appellant is entitled to plain error review when an error has occurred that will produce a manifest injustice, a miscarriage of justice or affect a person's substantial rights. *V.A.M.R.* 30.20. A plain error was made that resulted in a

manifest injustice, a miscarriage of justice and that affects this Appellant's substantial rights.

The events listed below clearly illustrate that a plain error occurred.

"Driving while intoxicated is for the first offense, a class B misdemeanor."

RSMo. § 577.010. Appellant was charged with a class D felony driving while intoxicated, as allowed under *RSMo.* § 577.023.6, § 577.023.14 and § 558.021, because he allegedly had prior convictions for this offense. (L.F. 14). No evidence was offered concerning the alleged prior offenses. No evidence was admitted concerning the alleged prior offenses. No findings were made concerning the alleged prior offenses.

The jury rendered its verdict finding the Appellant guilty of a class D felony driving while intoxicated. (L.F. 51). The judgment was entered and sentencing was ordered on November 6, 2001. (L.F. 55). Plain errors are those which are evident, obvious and clear. *State v. Bailey*, 839 S.W.2d 657, 661 (Mo.App. 1992). Under *RSMo.* § 577.023 and § 558.021, to be found a prior offender in a jury trial, the facts shall be pleaded, established and found prior to submission to the jury or before sentencing in some cases. In the present case, no facts were established or found before submission to the jury, prior to sentencing, nor at any time during the entire trial and sentencing procedures. To convict Appellant of a felony crime without the adequate proof to establish the felony is plain error, as it is evident, obvious and clear.

Plain error occurs where an essential element of an offense is omitted and the evidence fails to establish the omitted element. *State v. Roe*, 6 S.W.3d 411, 415-16 (Mo.App. 1999). The evidence in the present case failed to establish the prior offenses, which allow a driving while intoxicated offense to be a class D felony instead of a class B misdemeanor. Statutes require proof as a necessity to enhancing penalties or classes of crimes. *State v. Quick*, 639 S.W.2d 880 (Mo.App. W.D. 1982). The State fails to prove defendant's persistent offender status where one of the charges is unproved. *State v. Vickers*, 956 S.W.2d 405 (Mo.App. S.D. 1997). In the present case, none of the prior charges were proven.

The verdict finding Appellant guilty of a class D felony is inherently inconsistent with the evidence presented in the trial. "[A] verdict that is inherently inconsistent...may be considered plain error." *Albers Milling Co. v. Carney*, 371 S.W.2d 355 (Mo.App. 1963). Plain error has been found to occur when a person was sentenced for a class A felony but was only found guilty of a class B felony." *State v. Immekus*, 28 S.W.3d 421, 433 (Mo.App. S.D. 2000). The present case is similar, in that the Defendant was convicted of a class D felony but there was no evidence admitted supplying the necessary requirements for making the charge a class D felony instead of a class B misdemeanor. Plain error occurred.

If the Court chose to order resentencing instead of a new trial, the court could not hear evidence on the prior offenses at a resentencing hearing because to order the hearing of such evidence would be ordering the court to commit error, as

introducing prior persistent offender evidence after the cause was submitted to the jury is error. *State v. Cullen*, 39 S.W.3d 899 (Mo.App. E.D. 2001). *RSMo.* § 577.023.6, § 577.023.14 and § 558.021.

It makes no difference in the present case that the result of the sentencing was only a six month sentence. An inherently inconsistent verdict was given that produced an error which was evident, obvious and clear. The manifest injustice and the miscarriage of justice occurred by finding the Appellant guilty of a felony when he should have been only guilty of a misdemeanor, if any guilt was established. The result affects Appellant's substantial rights to Due Process of Law. *U.S. Const. amend XIV. MO Const. Art. I, § 10*. Under the present verdict, Appellant was convicted of a felony when according to the evidence produced and the applicable statutes, he should have been convicted of a class B misdemeanor, if any guilt was established. A miscarriage of justice occurred and plain error is evident, obvious and clear. Given the time since the verdict was rendered, there is no choice but to vacate the judgment and order the Defendant discharged.

II.

**THE COURT ERRED IN DELIVERING ITS SENTENCES
WITHOUT PERMITTING THE JURY TO RECOMMEND ITS OWN
PUNISHMENT, BECAUSE IT IS THE JURY'S RESPONSIBILITY TO
ASSESS PUNISHMENT AND NO EVIDENCE WAS SUBMITTED AND NO**

FINDINGS WERE MADE AS TO ANY PRIOR PERSISTENT OFFENDER STATUS AND THEREFORE, THE COURT SHOULD HAVE ALLOWED THE JURY TO ASSESS PUNISHMENT AS PART OF THEIR VERDICT. THE FAILURE TO ALLOW THE JURY TO ASSESS PUNISHMENT, VIOLATED APPELLANT'S RIGHT TO DUE PROCESS.

Appellant is entitled to plain error review when an error has occurred that will produce a manifest injustice, a miscarriage of justice or affect a person's substantial rights. *V.A.M.R.* 30.20. A plain error was made that resulted in a manifest injustice, a miscarriage of justice and that affects this Appellant's substantial rights.

The events listed below clearly illustrate that a plain error occurred. The trial court sentenced Appellant to six months for the felony D.W.I. and seven years for the Second Degree Assault, terms to be served consecutively. (L.F. 55, 56). The Court did not allow the jury to recommend its own sentences, as the Court gave the jury instructions which were titled WHERE PUNISHMENT IS NOT SUBMITTED TO THE JURY. (L.F. 51, 52). The theory of doing this was based upon the information filed alleging that Appellant was a prior persistent offender. (L.F. 14, 34). As stated in the Argument of Point I above, there was no evidence submitted and no findings were made that Appellant was a prior persistent offender.

“The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as part of their verdict, unless: ... (2) The state pleads and proves the defendant is a prior offender, persistent offender, dangerous offender, or persistent misdemeanor offender ...” *RSMo.* § 557.036.2.

“...[I]t is the jury’s responsibility to assess punishment.” *State v. McClanahan*, 954 S.W.2d 476, 481 (Mo.App. W.D. 1997). “The court’s authority [in sentencing] is limited in that the term of imprisonment imposed by the court cannot exceed the term declared by the jury. In other words, it is the primary function of the jury to set the maximum punishment.” *Id.* To not instruct the jury as to punishment is permissible if defendant is a prior offender. *State v. Gray*, 423 S.W.2d 776 (Mo. 1968). “Although a criminal defendant does not have a constitutional right to have a jury assess punishment, the defendant’s right to a jury’s recommendation of sentence is granted by statute, and if the sentence recommended by a jury is within the range of punishment for that crime, it constitutes the maximum sentence a court can impose.” *State v. Cooper*, 16 S.W.3d 680 (Mo.App. E.D. 2000). The failure to follow the procedure listed under the statutes, deprives the Defendant of his due process.

The court did not find that the Appellant was a prior persistent offender. The court did not have any evidence of any prior convictions upon which it could base such a finding. The court failed to follow *RSMo.* § 557.036.2, as it did not

instruct the jury as to the range of punishment and it did not allow them to assess and declare the punishment as part of their verdict. The court was required to allow the jury to declare punishment, the failure to do so is plain error. Plain error...results when the trial court has so misdirected or failed to instruct the jury that it is apparent to the appellate court that the instructional error affected the jury's verdict. *State v. Harney*, 515 S.W.3d 519 (Mo.App. W.D. 2001). In the past, the State has conceded that defendants have the right to have a jury assess punishment. *State v. Graham*, WL 587292, *10 (Mo. App. W.D. 1999).

The trial court failed to instruct the jury as to the range of punishment and failed to allow the jury to assess such punishment. The jury's verdict of guilty could have been affected as it could have been different had the Defendant been charged only with Misdemeanor D.W.I., the highest offense with which he could have been convicted under the evidence. The jury's verdict on the assessment of punishment was clearly and obviously affected as it was disallowed. Plain errors are those which are evident, obvious and clear. *Bailey* at 661. The failure of the court to allow the jury to assess punishment is evident, obvious and clearly violates RSMo. § 557.036 and is plain error.

The manifest injustice and miscarriage of justice occurred when the Appellant received two sentences passed down by the court without the jury's assessment of punishment. The jury is required by statute and case law to assess the punishment, as it recommends the maximum punishment. *McClanahan* at 481.

No maximum was entered by the jury on either count. However, the court sentenced the defendant to the MAXIMUM sentence on both counts (the D.W.I. maximum for a first offense is six months) and then ordered them served consecutively. The result is clearly erroneous, as the jury could not have given a higher sentence but could have clearly given a lower sentence for the court to follow on the D.W.I. or the Second Degree Assault. The final result is unknown but it substantially affected the right of the Appellant to Due Process of Law. *U.S. Const. amend XIV. MO Const. Art. I, § 10*. The jury should have had the opportunity to assess punishment and limit the court's power to render punishment. The failure to do so resulted in a miscarriage of justice and plain error.

There was no reason to take the jury's ability to assess punishment away from them. The court's failure to make any determination on the prior offender allegation deviates from the proper procedures to such a degree that the error is manifest because *RSMo. § 577.023* and *§ 558.016* require the proving and finding of the prior persistent offender convictions, among others not relevant in this case, to take the assessment of punishment away from the jury. *State v. Lowery*, 926 S.W.2d 712, 713 (Mo.App. E.D. 1996). Because of the time between the jury's verdict and the present and the possibility of jury contamination, the only cure for this error is to vacate both verdicts and sentences and order a new trial on the felony and discharge the defendant on the misdemeanor.

Resentencing alone will not cure the prejudice incurred by Appellant. If resentencing was ordered, however, the court could not hear evidence on the prior offenses at a resentencing hearing because to order the hearing of such evidence would be ordering the court to commit error, as introducing prior persistent offender evidence after the cause was submitted to the jury is error. *State v. Cullen*, 39 S.W.3d 899 (Mo.App. E.D. 2001). *RSMo.* § 577.023.6, § 577.023.14 and § 558.021.

III.

THE COURT ERRED IN SENTENCING APPELLANT AND ALLOWING THE JURY'S VERDICT ON THE SECOND DEGREE ASSAULT TO STAND BECAUSE THE JURY WAS MISLED AS TO THE EXISTENCE OF PRIOR CONVICTIONS WHICH WERE NOT PROVEN AND MISLED BY THE FELONY DRIVING WHILE INTOXICATED CHARGE WHEN A FELONY WAS NOT POSSIBLE BECAUSE OF THE FAILURE TO PROVE ANY PRIOR CONVICTIONS AND THE MISLEADING OF THE JURY PREJUDICED APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL.

Appellant is entitled to plain error review when an error has occurred that will produce a manifest injustice, a miscarriage of justice or affect a person's

substantial rights. *V.A.M.R.* 30.20. A plain error was made that resulted in a manifest injustice, a miscarriage of justice and that affects this Appellant's substantial rights.

The events listed below clearly illustrate that a plain error occurred. Appellant was charged with Felony D.W.I. and Second Degree Assault. (L.F. 14, 34). The informations were never changed and the judge never instructed the jury that there was no evidence of any prior convictions and therefore, there should be no felony D.W.I. and no prior persistent offender status. The jury heard other evidence and deliberated on the Felony D.W.I. and the Second Degree Assault under the impression that prior convictions had occurred. The judge did not inform the jury differently even though no evidence was submitted and no findings were made.

The Appellant was prejudiced by the allegations that prior convictions had occurred without any evidence to support the allegations. The jury was persuaded to find guilt due to the alleged prior acts. Obviously, the jury believed the Appellant to be a prior offender as the jury convicted the Appellant of Felony D.W.I. The jury was persuaded to find guilt on the Second Degree Assault because the D.W.I. was an alleged felony. The taint of the prior persistent offender status is so great that it substantially affected the Appellant's fundamental right to Due Process and a fair trial. The final result substantially affected the right of the Appellant to Due Process of Law. *U.S. Const. amend XIV. MO Const. Art. I,*

§ 10. For the Appellant to receive due process and a fair trial, the jury should not have been misled on the Appellant's alleged prior convictions or the alleged Felony D.W.I. when no Felony could have been found under the evidence. Prejudice occurred because the jury considered evidence which was not submitted to the court. The jury's determination was clearly affected and the Appellant failed to receive a fair trial due to the jury's bias from the unproven prior convictions and unlawful Felony D.W.I. The failure to receive a fair trial and due process results in a miscarriage of justice and plain error.

IV.

THE COURT ERRED IN INSTRUCTING, CONVICTING AND SENTENCING THE APPELLANT TO BOTH A DRIVING WHILE INTOXICATED OFFENSE AND A SECOND DEGREE ASSAULT BECAUSE DOUBLE JEOPARDY PROHIBITS THE CONVICTIONS OF BOTH CRIMES ARISING FROM THE SAME SET OF CIRCUMSTANCES.

Appellant is entitled to plain error review when an error has occurred that will produce a manifest injustice, a miscarriage of justice or affect a person's substantial rights. *V.A.M.R.* 30.20. A plain error was made that resulted in a

manifest injustice, a miscarriage of justice and that affects this Appellant's substantial rights.

The events listed below clearly illustrate that a plain error occurred. Appellant was charged with Felony D.W.I. and Second Degree Assault. (L.F. 14, 34). The elements of a D.W.I. are included in the Second Degree Assault charged in this case, as it required a finding that the Appellant was driving while intoxicated. *Rost v. State*, 921 S.W.2d 629 (Mo.App. S.D. 1996), held that a defendant could not be convicted of both a D.W.I. and this form of Second Degree Assault, because it violated the double jeopardy clauses of the United States' Constitution and the common law of Missouri. *U.S. Const. amend V and amend. XIV. State v. Tombs*, 34 S.W.2d 61, (Mo. 1930).

The *Rost* court held that in the specific facts of that case, the double jeopardy provisions were not violated because there were separate cases entered and Appellant was convicted of both cases separately. In the present case, the cases were tried and submitted to the jury at the same time. The trial court listed the different charges as counts I and II. (L.F. 51, 52, 55, 56). The case was tried under one case number, CR101-7F. (L.F. 51, 52, 55, 56). Clearly the present case does not meet the exception set out in *Rost*. Therefore, the double jeopardy clause should apply and the convictions should be vacated.

Rost also stated that in that case the appellant had waived his right to assert a double jeopardy claim because he had pled guilty. In the present case, the

Appellant did not waive his right to assert the double jeopardy claim as he did not plead guilty but had a jury trial on both issues. The trial court failed to instruct the jury that they could only convict Appellant of one offense. In the present case, the Appellant did not plead guilty. Therefore, he does not fall under the exception to the double jeopardy provisions, stated in *Bally v. Kemna*, 65 F.3d 104 (8th Cir. 1995). In *Bally*, the court held that if an Appellant pleads guilty to a lesser included offense to avoid the higher offense, the appellant waives his claim to double jeopardy. Clearly, the Appellant in the present case did not plead guilty and therefore, did not waive his right to assert the double jeopardy provisions. The manifest injustice and the miscarriage of justice occurred by instructing, convicting and sentencing the Appellant to two different charges when only one act occurred. The result affects Appellant's substantial rights, as he has been denied a fundamental right under the United States Constitution and Missouri common law. Therefore, the double jeopardy clauses should apply and the convictions should be vacated as plain error occurred.

CONCLUSION

For any and all of the above reasons, Appellant respectfully suggests that the trial court's decision be reversed and Appellant be granted judgment to reverse and remand the cause for a new trial.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing **APPELLANT'S SUBSTITUTE BRIEF** was served on Jeremiah Nixon, Attorney General for the State of Missouri, Supreme Court Bldg., P.O. Box 899, Jefferson City, MO 65102, by mailing same through United Parcel Service (UPS) over night delivery this 14th day of October, 2002, with sufficient postage thereon to insure delivery.

Amy Bunch

Appellate No. SC84718

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Case No. CV101-7F

CERTIFICATE AS REQUIRED BY 84.06(C)(1-4)

I, Kelly Bosserman, certify that I am the attorney for Appellant Rick Emery, in the above captioned cause; that the brief previously filed with this Court includes the information required by Rule 55.03 as evidenced by said brief and in this certificate; and that the brief previously filed with this Court complies with the limitations contained in Rule 84.06(b) by consisting of only 3,895 words and 411 lines.

Respectfully submitted,

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CERTIFICATE AS REQUIRED BY 84.06(g)

I, Kelly Bosserman, certify that I am the attorney for Appellant Rick Emery, in the above captioned cause; and that the disk containing the appellate

brief and cover letter, filed along with this certificate, complies with the requirements set out in 84.06(g) and has been scanned for viruses and is virus-free.

Respectfully submitted,

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